BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

This petition of your defendants for a writ of certiorari presents a case where a Circuit Court of Appeals has so far sanctioned the departure of a court trial from the accepted and usual course of judicial proceedings, as to call for the exercise of this Honorable Court's power of supervision.

The Court of Appeals decided the case of *"Francis X. Gomila and Anthony Chauppette versus United States of America"*, No 11084 of the docket of the United States Circuit Court of Appeals for the Fifth Circuit during the same session and, shortly before the decision in the instant case.

In the case above cited, His Honor, the Trial Judge, made the following charge to the jury:

> "The rule of the presumption of innocence imposes upon the government the burden of establishing the guilt of each defendant, as stated, beyond a reasonable doubt, but, Gentlemen, as forceful as that rule is in protecting one charged with crime, it must never be forgotten that it was not intended, nor has it ever been intended, as extending an aid to one, *WHO IN FACT IS GUILTY*, so that he may escape just punishment. The rule is but a humane provision of the law, intended to prevent, so far as human agencies can, the conviction of an innocent defendant, but absolutely nothing more."

The above charge is also set forth on page 3 of the opinion rendered by the *Circuit Court of Appeals* in the *Gomila* case above cited. That court also, on the same page of its opinion, made the following observation:

> "The statement that the presumption of innocence 'was not intended, nor has it ever been intended, as extending an aid to one, who in fact is guilty, so that he may escape just punishment' is not a correct statement of the law. The *presumption* of *innocence applies alike* to the *guilty* and to the *innocent*, and the burden rests upon the Government throughout the trial to establish, by proof beyond a reasonable doubt, the guilt of the accused. Until guilt is established by such proof, the defendant is shielded by the presumption of innocence. The fact of guilt does not enter into the application of the rule, the intent and purpose of which is to protect *all* persons coming before the courts charged with crime until the presumption of innocence is overthrown by evidence establishing guilt beyond a reasonable doubt; and, where the evidence is purely circumstantial, to the exclusion of every reasonable hypothesis of innocence."

Particular attention is called to the words above used, "the *presumption* of *innocence* applies *alike* to the *guilty* and to the *innocent*" and "the fact of guilt does not enter into the application of the rule, the intent and purpose of which is to protect all persons coming before the courts charged with crime until the presumption of innocence is overthrown by evidence establishing guilt beyond a reasonable doubt". How then can this same Court consistently hold (the errors being the same and more properly ex-

cepted to in the instant case) that they be called one thing in the *Gomila* case and have another meaning in the case of your defendants?

The opinion of the Court of Appeals in the case now before Your Honors holds:

> "The record discloses that the trial judge from time to time would break in and interrupt questions being propounded to the witnesses both by counsel for the Government and for the defendants. This line of questioning appears throughout the trial and until the conclusion of the evidence. This practice of the court was highly improper, as it prevented an orderly trial of the case. However, we do not find that such practice by the trial judge constitutes prejudicial error in this case. A similar practice of the court in the case of Gomila and Chauppette vs. U. S., recently decided, cumulated with other errors discussed therein, was held to be prejudicial. In *that* case the testimony connecting the appellants with the crime charged was almost wholly that of confessed accomplices, uncorroborated. *Here* the testimony *establishing* the *guilt* of the appellants is *uncontradicted* and of a nature to leave no room for doubt as to the guilt of appellants. Under such condition, the error of the trial judge was not prejudicial."

It is not to be expected that errors committed by the lower court and recognized by the appellate court can with impunity be cast aside and held for naught merely because evidence introduced tended to show guilty, particularly when that very same evidence forms the basis or gravamen of the complaints alleged and set forth in

the numerous bills of exception reserved during the trial. A reading of the record will show the manner of the questioning of the prosecuting witnesses, the questions propounded, the manner of reception by the Court and the comments of the court thereon. What questions would have been propounded and what would have been answered, and how would they have been accepted, had the defendants taken the stand or elected to place witnesses on the stand in their behalf, is, of course, now only a matter of conjecture, and it is sincerely urged that Your Honors can not in fairness to anyone answer this question until you have read the record and have asked yourselves the question, what the result might have been.

Your Honors will please refer to page six of the petition for rehearing (Tr. 389). It will there be observed that the defendants were branded as being of bad moral character and any testimony that they might have given would have been received with prejudice and looked upon with suspicion by the Jury. Any defense that they might have had was cancelled in advance and, for the Court of Appeals to say that what was *reversible* error in the *Gomila* case is not to be considered in *this* case is to *cancel* the right of the defendants to equal justice and deprive them of equal protection of the law without mental reservation or equivocation.

It is further urged that a reading of the record in the case now presented to Your Honors will show a cumulation of errors infinitely more damaging, more consistently committed and more constantly objected to than in the *Gomila* case.

Your Honors recently granted a writ of certiorari in the case of *Lee F. Weiler vs. United States of America*, No. 340 of the October Term, 1944, to the United States Circuit Court of Appeals for the Third Circuit and in sustaining the writ, on page four of the opinion said:

> "Thus to permit the judge finally to pass upon this question would enable a jury to convict on the evidence of a single witness, even though it believed, contrary to the belief of the trial judge, that the corroborative testimony was wholly untrustworthy."

> "We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility."

The authorities cited in the petition for re-hearing (Tr. 385-393) accurately and definitely set forth the inconsistencies hereinabove complained of and, while commending the Court of Appeals on its reversal of the decision of the lower court in the *Gomila* case, we most positively maintain that it would be unfair and unjust to refuse the same privilege and prerogative to the defendants in this case as was granted in the *Gomila* case.

While the case at bar differs in its basic facts from *Chambers v. Florida*, 309 U. S. 227, 60 S. Ct. 472, we can find no more appropriate language with which to conclude this brief, than the quotation from the eloquent opinion of Mr. Justice Black:

"Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."

Respectfully submitted,

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